Eagle Ray Electric Company *and* International Brotherhood of Electrical Workers, Local #1, AFL–CIO. Case 14–CA–29785

November 25, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks summary judgment in this case on the ground that the issues raised in the complaint and answer are legal in nature and there are no issues of material fact in dispute warranting a hearing.

Pursuant to a charge filed by the Union on June 30, 2009, and amended on August 24, 2009, the General Counsel of the National Labor Relations Board issued a complaint on August 26, 2009, alleging that the Respondent violated Section 8(a)(5) and (1) by ceasing its operations without prior notice to the Union and without affording the Union an opportunity to bargain over the effects of the cessation of operations and the resulting layoffs of the unit employees. The Respondent filed an answer on September 2, 2009, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On September 17, 2009, the General Counsel filed a Motion for Summary Judgment and to transfer the proceeding to the Board, and a brief in support of the motion. On September 29, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The Union filed a response in support of the motion.

Ruling on Motion for Summary Judgment[1]

The Respondent admits in its answer that it ceased operations and laid off all unit employees without affording the Union an opportunity to bargain about the effects of the cessation and the layoff, as alleged in the complaint. The Respondent also admits that the Union requested bargaining on the effects of the cessation of operations and that the Respondent did not respond to the request. However, the Respondent asserts certain affirmative defenses, principally that the Board improperly certified the Union as the exclusive bargaining representative of unit employees and that the Respondent therefore has no duty to bargain with the Union.[2]

The Respondent had the opportunity to raise these representation issues during the representation proceeding before the Board.[3] The Respondent does not cite any newly discovered and previously unavailable evidence that could be adduced at a hearing, or special circumstances that would require the Board to reconsider its decision in the representation proceeding. Therefore, we find that the representation matters raised by the Respon-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB,* ___F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted, __ S.Ct. __ , 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed, 78 U.S.L.W.3185 (U.S. September 29, 2009) (No. 09-377).

[2] The Respondent also asserts, as affirmative defenses, that it was winding down or had ceased business operations due to economic conditions, and that the Board has acted as an advocate for the Union, rendering the certification invalid. The Respondent has provided no evidence in support of these assertions. In addition, the Respondent's affirmative defenses were specifically rejected by the Board in an earlier proceeding involving a refusal to bargain. Moreover, as to the Respondent's defense that it was winding down or had ceased operations, the Board noted in the earlier proceeding that, even if this contention were accurate, the Respondent would be obligated, at a minimum, to bargain with the Union concerning the effects of its decision. *Eagle Ray Electric Co.*, 354 NLRB No. 27, slip op. at 1, fn.3 (2009).

[3] The Union was certified as the representative of the unit in Case 14–RC–12739. Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sec. 102.68 and 102.69(g). See *Frontier Hotel*, 265 NLRB 343 (1982). In the representation proceeding, the Respondent did not file objections to the conduct of the election.

dent are not properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Moreover, we find no factual issues that warrant a hearing because the Respondent has admitted the crucial factual allegations underlying the complaint allegations. The complaint alleges, and the Respondent admits, that it ceased operations and laid off unit employees without giving the Union prior notice and an opportunity to bargain. The Respondent further admits that it did not respond to the Union's request for bargaining over the effects of its cessation on the unit.

It is well established, and the Respondent admits, that the effects of a cessation operations and the layoff of unit employees as a consequence of such a decision are mandatory subjects of bargaining. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 fn. 15 (1981). The Respondent, however, contends that its action was lawful based on the affirmative defenses noted above, which we have rejected.

Accordingly, having found no genuine issues of fact warranting a hearing and no merit to the Respondent's defenses, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times until sometime between January 1, 2009 and June 15, 2009, the Respondent, a Missouri corporation with an office and place of business in Ellisville, Missouri, operated an electrical contracting business in the construction industry.

During the calendar year ending December 31, 2008, the Respondent, in conducting its business operations described above, purchased and received at its Ellisville, Missouri facility goods valued in excess of $50,000 directly from points outside the State of Missouri.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Brotherhood of Electrical Workers, Local #1, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.[4]

[4] The complaint does not include any allegations concerning the Union's status as a labor organization. However, we take administrative notice of the fact that in a previous case involving this Respondent and Union, the Board found that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. 354 NLRB No. 26, supra at slip op. 2.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Kenneth Gilbert President

Margaret Gilbert Vice President

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time journeyman electricians and apprentice electricians employed by the Employer at its Ellisville, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

On October 17, 2008, a representation election was conducted among the employees in the unit and by Board decision dated February 5, 2009, and corrected February 24, 2009, the Union was certified as the exclusive collective-bargaining representative of the unit. At all material times, the Union has been the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

Sometime between January 1, 2009, and June 15, 2009, the Respondent ceased operations and laid off all unit employees. About June 15, 2009, the Union, by letter, requested bargaining with the Respondent over the effects of its cessation of operations in the unit. These subjects relate to wages, hours, and other terms and conditions of employment, and are mandatory subjects of collective bargaining.

The Respondent engaged in the above conduct without prior notice to the Union and without affording the Union an opportunity to bargain over the effects of the Respondent's cessation of operations and the resulting layoff of unit employees.

We find that the Respondent's failure and refusal to bargain with the Union over the effects of its cessation of operations and the resulting layoff of unit employees constitutes an unlawful failure and refusal to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent failed and refused to bargain collectively and in

good faith with the exclusive collective-bargaining representative of its unit employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the Respondent's cessation of operations and the resulting layoff of the unit employees, we shall order the Respondent to bargain with the Union, on request, about the effects of its cessation of operations.

As a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to cease operations, however, the laid-off employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of ceasing operations on its employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[5]

Thus, the Respondent shall pay its laid-off employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the laid-off employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6]

In view of the fact that the Respondent has ceased operations at its Ellisville, Missouri facility, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Eagle Ray Electric Company, Ellisville, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local #1, AFL–CIO, as the exclusive collective-bargaining representative of the unit described below, regarding the effects of its decision to cease operations at its Ellisville, Missouri facility and the resulting layoff of unit employees. The appropriate unit is:

> All full-time and regular part-time journeyman electricians and apprentice electricians employed by the Employer at its Ellisville, Missouri facility, EXCLUDING of-

[5] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

[6] The General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

fice clerical and professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union about the effects on the unit employees of its decision to cease operations at its Ellisville, Missouri facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay to the laid-off unit employees their normal wages for the period set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, duplicate and mail, at its own expense, and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[7] to the Union and to all unit employees who were employed by the Respondent at its Ellisville, Missouri facility as of its cessation of operations and layoff of unit employees on a date between January 1 and June 15, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 25, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LABOR LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for you benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local #1, AFL-CIO, as the exclusive collective-bargaining representative of the unit described below, regarding the effects of our decision to cease operations at our Ellisville, Missouri facility and the resulting layoff of unit employees. The appropriate unit is:

All full-time and regular part-time journeyman electricians and apprentice electricians employed by us at our Ellisville, Missouri facility, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request bargain collectively and in good faith with International Brotherhood of Electrical Workers, Local #1, AFL–CIO, concerning the effects on unit employees of our decision to cease operations at our Ellisville, Missouri facility and the resulting layoff of unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay to our laid-off unit employees their normal wages for the period set forth, with interest.

EAGLE RAY ELECTRIC COMPANY

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."